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No. 01-11031

IN THE SUPREME COURT OF THE UNITED STATES

TERRENCE DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's motion under Federal Rule of Civil Procedure 60(b) filed in 2000 to overturn his 1994 convictions was correctly recharacterized as a second or successive motion under 28 U.S.C. 2255.

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OPINION BELOW

The judgment of the court of appeals (Pet. App. A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 2001. A petition for rehearing was denied on February 11, 2002. The petition for a writ of certiorari was filed on April 23, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted of three counts of bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and two counts of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). Gov't C.A. Br. 1, United States v. Davis (8th Cir. No. 94-3970WM) ("Gov't C.A. Br."). He was sentenced to 420 months' imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. United States v. Davis, 65 F.3d 172 (8th Cir. 1995) (Table).

Petitioner's motion for relief under 28 U.S.C. 2255 was denied by the district court, and the court of appeals denied petitioner's application for a certificate of appealability. Judgment dated 9/8/99, Davis v. United States (8th Cir. No. 99-2407WMKC). Petitioner then filed a motion to dismiss his convictions for lack of subject matter jurisdiction, which the district court denied. In November 2000, petitioner filed a motion under Federal Rule of Civil Procedure 60(b)(4) for relief from his judgment of conviction. The district court denied the motion, Pet. App. C, and the court of appeals dismissed petitioner's appeal. Pet. App. A.

1. Between December 17, 1993, and February 16, 1994, petitioner participated in three armed bank robberies of the Boatmen's Bank in Kansas City, Missouri. During the second and third robberies, both petitioner and his co-conspirator Troy Taylor

displayed guns. During the third robbery, the robbers took a customer hostage and exchanged gun fire with a security guard. The robbers crashed their car during the attempted getaway and fled on foot. A short time later, police captured two of petitioner's co-conspirators, who identified petitioner as the third robber. That same day, petitioner called his cousin, from whom he had borrowed the getaway car, and told him to report it stolen. Petitioner's cousin learned that his car had been used in the robbery when he recognized it on the evening news. Gov't C.A. Br. 2-7; Presentence Report (PSR) at 5-7.

2. During trial, petitioner and his counsel signed a stipulation acknowledging that the Boatmen's Bank was "an institution whose deposits were then insured by the Federal Deposit Insurance Corporation (FDIC)." Pet. App. D at 2. The court's instructions reminded the jury of that stipulation and stated that "[y]ou should therefore treat this as having been proved." Pet. App. H. On direct appeal, petitioner did not raise any issue relating to this stipulation or instruction. Gov't C.A. Br. 8-11; United States v. Davis, 65 F.3d 172 (8th Cir. 1995) (Table).

3. In 1997, petitioner filed a motion for collateral relief under 28 U.S.C. 2255. He claimed, among other things, that his counsel was ineffective when he convinced petitioner to stipulate that the Boatmen's Bank was insured by the FDIC because the stipulation removed a possible basis for the jury to find him not

guilty. Order Denying Petitioner's Motion for Relief Pursuant to 28 U.S.C. § 2255 at 3 (Davis v. United States, No. 97-0638-CV-W (W.D. Mo. 1999)). On February 25, 1999, the district court denied that motion, finding that defense counsel's conduct was not unprofessional because "[w]ithout a factual basis for arguing that the bank was not insured by the FDIC, the decision to stipulate that the bank was insured by the FDIC was not unreasonable." Ibid. The district court denied petitioner's request for a Certificate of Appealability and the court of appeals dismissed petitioner's appeal. Judgment dated 9/8/99, Davis v. United States (8th Cir. No. 99-2407WMKC).

4. On July 21, 1999, petitioner filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction, which the district court denied as "frivolous." Order dated 1/16/00 Denying Defendant's Motion to Reverse and Dismiss Convictions For Lack of Subject Matter Jurisdiction at 1 (United States v. Davis, No. 94-00032-CR-W-9).

5. On November 11, 2000, petitioner filed a motion pursuant to Federal Rule of Civil Procedure 60(b)(4) contending that his 1994 convictions should be overturned because the government failed to prove that the Boatman's Bank was insured by the FDIC. Petitioner argued that the government was required to introduce evidence to prove that fact because subject matter jurisdiction cannot be conferred upon the court by stipulation. In addition,

petitioner argued that the trial court's instructions precluded the jury from deciding the jurisdictional element of the case and therefore deprived him of his Sixth Amendment right to a jury trial.

On August 31, 2001, the district court denied petitioner's motion. Pet. App. C. The court found that petitioner's claims were "in the nature of post-conviction relief and are of a type that could be brought in a proceeding pursuant to 28 U.S.C. § 2255." Id. at 2. Accordingly, the court "construe[d] Davis's motion as a successive motion for relief from judgment pursuant to 28 U.S.C. § 2255." Because petitioner had not obtained a certification from the court of appeals allowing him to file such a motion, see 28 U.S.C. 2244(b) and 2255, the court concluded that petitioner's motion should be denied. Ibid. In a footnote, the court noted that "[t]his motion should properly be denied under Rule 60(b) also as it was not brought 'within a reasonable time' after entry of judgment. Fed. R. Civ. P. 60(b)." Id. at 2 n.1.

6. Petitioner filed an appeal, which the government moved to dismiss on the grounds that petitioner had failed to obtain a certificate of appealability and that his action was frivolous. Motion to Dismiss filed 10/30/01 at 3-5, Davis v. United States (8th Cir. No. 01-3553). By judgment dated December 20, 2001, the court of appeals indicated that it had "carefully reviewed appellant's brief and the original file of the district court" and

that petitioner's appeal was dismissed. Pet. App. A.

ARGUMENT

Petitioner contends (Pet. 9) that the district court erred in construing his motion as a second or successive motion under 28 U.S.C. 2255, arguing that "Rule 60(b) is a distinct rule and procedure not governed by 28 U.S.C. §§ 2244(b), 2255, or the AEDPA." Pet. 9. That claim lacks merit and does not warrant further review.

1. Under 28 U.S.C. 2255, a second or successive motion for collateral relief cannot be filed unless the court of appeals certifies that it relies either on newly discovered evidence or a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court.[1] Petitioner does not claim that he was entitled to file such a second or successive motion in this case. Instead, he claims that his motion is properly construed as a motion to reopen his 1994 convictions pursuant to

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[1] Specifically, in order to file a second or successive motion under Section 2255, a prisoner must first receive certification from a court of appeals that the motion relies on:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. 2255, ¶ 8.

Federal Rule of Civil Procedure 60(b). That claim is without merit.

a. As an initial matter, review is unwarranted because petitioner would not be entitled to relief even if, as he requests, his motion were treated as having been brought under Rule 60(b). Rule 60(b) authorizes a court to relieve a party from an adverse judgment for mistake or inadvertence, newly discovered evidence, fraud or other misconduct, a void judgment, satisfaction of the judgment, or any other reason justifying relief. Petitioner's underlying claims -- that parties can not stipulate to jurisdictional facts and that the district court misinstructed the jury on his bank robbery offenses -- are challenges to his criminal convictions. See Pet. App. C at 1 ("The judgment from which defendant seeks relief is his judgment of conviction dated December 7, 1994."). Rule 60(b), however, is a civil rule, and does not provide for relief from a judgment in a criminal case. United States v. Mosavi, 138 F.3d 1365, 1366 (11th Cir. 1998) (per curiam); United States v. O'Keefe, 169 F.3d 281, 289 (5th Cir. 1999) (Dennis, J., dissenting from grant of stay pending appeal); United States v. Brown, No. 96-79, 2000 WL 375235 (E.D. La. April 11, 2000) (collecting cases); see Fed. R. Civ. P. 1 ("[t]hese rules govern the procedure in the United States district courts in all suits of a civil nature").

Furthermore, petitioner failed to raise these claims on direct

review of his conviction. Ordinarily, where a claim could have been decided on direct review, that claim cannot be relitigated pursuant to Rule 60(b). Bell v. Eastman Kodak Co., 214 F.3d 798, 800-801 (7th Cir. 2000) (claims that could have been raised on direct appeal -- including a claim that the district court lacked subject matter jurisdiction -- are not cognizable under Rule 60(b)); see 11 Wright, Miller & Kane, Federal Practice and Procedure, § 2862 at 331 (1995).

A Rule 60(b) motion must be filed "within a reasonable time" after the judgment, or within one year if the grounds are mistake or inadvertence, newly discovered evidence, or fraud. Petitioner's motion was filed in 2000, almost six years after he was sentenced by the district court. As the district court concluded, his motion was untimely. See Rodriguez v. Mitchell, 252 F.3d 191, 201 (2d Cir. 2001) (Rule 60(b) motion denied because three and one-half year delay was unreasonable).

In any event, a Rule 60(b) motion may be granted only in extraordinary circumstances. Rodriguez v. Mitchell, 252 F.3d at 201; Cashner v. Freedom Stores, Inc., 98 F.3d 572, 579 (10th Cir. 1996). Petitioner has not met that demanding standard. Indeed, petitioner's underlying claims lack merit.

Petitioner contends first that his stipulation that the deposits of the Boatmen's Bank were insured by the FDIC was "unacceptable and illegal" (Pet. 5) because parties to a federal

court action may not confer subject matter jurisdiction upon the court by stipulation. Pet. 5-8. But the district court's jurisdiction existed because the government filed an indictment alleging a federal offense, see 18 U.S.C. 3231, not because of proof of the FDIC insurance element. A failure of the indictment to allege, or the government to prove, an element of the offense, such as the FDIC insurance requirement, would not deprive the district court of subject matter jurisdiction. See United States v. Cotton, 122 S. Ct. 1781, 1785 (2002). As the court explained in United States v. Martin, 147 F.3d 529, 531-532 (7th Cir. 1998):

> Martin's argument [that the government did not prove a nexus to commerce] rests on the concept that a guilty plea does not waive jurisdictional defenses to the crime at issue. But the nexus with interstate commerce, which courts frequently call the "jurisdictional element," is simply one of the essential elements of [18 U.S.C.] § 844(i). Although courts frequently call it the "jurisdictional element" of the statute, it is "jurisdictional" only in the shorthand sense that without that nexus, there can be no federal crime under the bombing statute. It is not jurisdictional in the sense that if affects a court's subject matter jurisdiction, i.e., a court's constitutional or statutory power to adjudicate a case, here authorized by 18 U.S.C. § 3231. * * * Even if the government fails to establish the connection to interstate commerce, the district court is not deprived of jurisdiction to hear the case.

Ibid. (citations omitted); accord United States v. Ryan, 41 F.3d 361, 363-364 (8th Cir. 1994) (en banc) ("The interstate commerce aspect of this case arises merely as an element of the section 844(i) offense. If that element is not satisfied, then Ryan is not

guilty; but the court is not by the failure of proof of that element deprived of judicial jurisdiction."), cert. denied, 514 U.S. 1082 (1995). The same is true with respect to proof of FDIC insurance. A stipulation on the existence of such insurance, which is common in federal prosecutions, see United States v. Sliker, 751 F.2d 477, 484 n.3 (9th Cir. 1984), cert denied, 470 U.S. 1058 (1985), and 471 U.S. 1138 (1985), establishes an element of the offense; it is not relevant to establishing the district court's jurisdiction. Accordingly, the rule that parties may not stipulate to jurisdiction has no application here.

Second, petitioner contends (Pet. 10-12) that the district court erred in instructing the jury that, given the parties' stipulation that "at the time of the three bank robberies, Boatmen's Bank was insured by the [FDIC]," "[y]ou should therefore treat this as having been proved." Pet. App. H. Petitioner argues that the instruction interfered with his Sixth Amendment right to have the jury decide each element of the offense. Pet. 10.

Because petitioner did not raise that claim at trial or on direct appeal, he could not raise it on collateral attack without establishing both cause for his default and actual prejudice. See United States v. Frady, 456 U.S. 152, 167-168 (1982). Petitioner's Rule 60(b) motion is tantamount to a collateral challenge, and should be subject to the cause-and-prejudice rule. He can show neither here.

In fact, the transcript of the charge conference clearly demonstrates that defense counsel consented to that instruction. See Pet. App. E ("Judge, a copy of that instruction has been provided to the defendant and we do not object."). Because counsel expressly agreed to the instruction, defendant has waived any claim that it was error. United States v. Jackson, 124 F.3d 607, 617-618 (4th Cir. 1997) (defendant waived any error when he knowingly failed to object to jury instruction explaining the effect of a stipulation), cert. denied, 522 U.S. 1066 (1998); but see United States v. Barrow, 118 F.3d 482, 490-491 (6th Cir. 1997) (declining to apply invited error doctrine to stipulated jury instruction).

Nor can petitioner show prejudice. Since petitioner stipulated that the Boatmen's Bank was FDIC insured, and the record contained no evidence to the contrary, petitioner cannot possibly show that the allegedly "erroneous" instruction affected the outcome of his trial. United States v. Jones, 108 F.3d 668, 671 (6th Cir. 1997) (en banc); Barrow, 118 F.3d at 492-493; United States v. Cornish, 103 F.3d 302, 306 (3d Cir.), cert. denied, 520 U.S. 1219 (1997); see United States v. Gonzalez, 110 F.3d 936, 947 (2d Cir. 1997) ("Because defendants do not even argue, let alone establish, that the outcome in their case would have differed had the judge properly instructed the jury on the legal effect of the stipulations, it is plain to us that their substantial rights were unaffected.").

The same result would follow even if petitioner's claim were reviewed under the less-demanding plain-error standard for claims, like his, that were not raised at trial. Fed. R. Crim. P. 52(b). Under the fourth prong of the plain error test, a court should not exercise its discretion to correct a plain error unless that error seriously affects the fairness, integrity or public reputation of the judicial proceedings. United States v. Olano, 507 U.S. 725, 732 (1993). Where the defendant voluntarily stipulates to true facts, it does not result in a miscarriage of justice to instruct the jury that these facts should be treated as proven. Barrow, 118 F.3d at 493; Jones, 108 F.3d at 672; Cornish, 103 F.3d at 306; see Johnson v. United States, 520 U.S. 461, 469 (1997) (failure to present element of materiality to jury did not seriously affect the fairness, integrity, or public reputation of judicial proceedings where evidence of materiality was overwhelming and element was essentially undisputed at trial).[2]

b. Rather than treat petitioner's motion as a failed or untimely Rule 60(b) motion, the courts below construed it as a

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[2] The same analysis applies to petitioner's apparent claim that, after instructing the jury it "should" find that the bank was FDIC insured, the district court erred in omitting that element from its instruction on the bank robbery offense. Pet. 10-12, Pet. App. E, App. to Motion for Relief Pursuant to Rule 60(b)(4) (Jury Instruction 17). Assuming arguendo that any error occurred, that error did not prejudice petitioner and will not result in a miscarriage of justice. Gonzalez, 110 F.3d at 944-947 (even assuming that failure to charge on stipulated element was error, claim does not survive plain error review).

second or successive Section 2255 petition. This Court has recognized that a party may not evade the limitations on second or successive petitions under 28 U.S.C. 2244(b) by simply characterizing such a motion as something else. See Calderon v. Thompson, 523 U.S. 538, 552 (1998). Thus, if a movant files a Rule 60(b) motion that attacks the validity of his underlying criminal conviction or sentence after filing an earlier petition or motion under Section 2254 or 2255, a court may regard the Rule 60(b) motion as second or successive under Section 2254 or 2255. See, e.g., Thompson v. Calderon, 151 F.3d 918, 921 (9th Cir.) (en banc), cert. denied, 524 U.S. 965 (1998); Lopez v. Douglas, 141 F.3d 974, 975 (10th Cir.), cert. denied, 525 U.S. 1024 (1998); United States v. Rich, 141 F.3d 550, 551 (5th Cir. 1998), cert. denied, 526 U.S. 1011 (1999); Burris v. Parke, 130 F.3d 782, 783-784 (7th Cir.), cert. denied, 522 U.S. 990 (1997); Felker v. Turpin, 101 F.3d 657, 660-661 (11th Cir.), cert. denied, 519 U.S. 989 (1996); Mathenia v. Delo, 99 F.3d 1476, 1480 (8th Cir. 1996), cert. denied, 521 U.S. 1123 (1997); Hunt v. Nuth, 57 F.3d 1327, 1339 (4th Cir. 1995), cert. denied, 516 U.S. 1054 (1996).

Some courts have also held that a Rule 60(b) motion may be used to correct certain errors in the earlier habeas proceeding. See Rodriguez v. Mitchell, 252 F.3d at 198-199 (Rule 60(b) motion proper to challenge defense counsel's fraudulent representations to district court in habeas proceeding); Banks v. United States, 167

F.3d 1082, 1084 (7th Cir. 1999) (per curiam) (misconduct of defense counsel during habeas proceedings); United States v. Phillips, 225 F.3d 1198, 1201 (11th Cir. 2000) (error in collateral attack proceeding). But here, petitioner's purported Rule 60(b) motion directly attacked the validity of his underlying convictions, and accordingly those decisions do not apply.[3]

2. This case need not be held pending this Court's decision in Abdur-Rahman v. Bell, No. 01-9094 (cert. granted, April 22, 2002). The petition for certiorari in Abdur-Rahman presented the question whether "every Rule 60(b) motion constitutes a prohibited 'second or successive' habeas petition as a matter of law." This case does not present that issue because the court of appeals below did not announce a categorical rule. Also, the Rule 60(b) motion at issue in Abdur-Rahman, like the one at issue in the Second Circuit's Rodriguez case discussed above, purports to challenge errors in the collateral habeas proceedings, whereas the Rule 60(b) motion at issue here directly challenged petitioner's convictions. Even a favorable resolution of the issue for the habeas petitioner in Abdur-Rahman would, therefore, be unlikely to assist petitioner here. In any event, for the reasons explained above, even if

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[3] Nor does the result below conflict with United States v. Miller, 197 F.3d 644 (3d. Cir. 1999), United States v. Kelly, 235 F.3d 1238 (10th Cir. 2000), or Adams v. United States, 155 F.3d 582 (2d Cir. 1998), which all concerned whether a motion brought under a rule other than Section 2255 should be recharacterized as a first motion under Section 2255.

petitioner's untimely Rule 60(b) motion had not been recharacterized as a second petition under Section 2255, it would fail on the merits. Thus, this Court's decision in Abdur-Rahman will not affect the proper disposition of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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